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In The

Supreme Court of the United States

October Term, 1969

No. 1542

SAUL CANTOR and MABEL CANTOR,

Petitioners,

vs.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MADISON, MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, a municipal corporation of New Jersey, MADISON TOWNSHIP SEWERAGE AUTHORITY and MADISON TOWNSHIP BOARD OF EDUCATION,

Respondents.

REPLY OF RESPONDENTS, MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, MADISON TOWNSHIP SEWERAGE AUTHORITY and MADISON TOWNSHIP BOARD OF EDUCATION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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TABLE OF CONTENTS

Page

Question Presented 1

Statement of the Case 2

Argument:

Point I. The Courts below were fully cognizant of the long established principles of New Jersey Law which were in full accord with the dictates of the Fifth and Fourteenth Amendments to the Federal Constitution; petitioners have simply failed to prove such facts at trial as would have required the application of those settled principles and consequently a Writ of Certiorari should be denied. ... 7

Conclusion 11

Contents

Page

Table of Citations

CASES CITED:

Daniels v. Borough of Point Pleasant, 23 N.J. 357, 129 A.2d 265 (1957) 8

Midtown Properties, Inc. v. Madison Twp., 68 N.J. Super. 197 (Law Div. 1961), affirmed o.b. 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1966) 8

West Park Avenue, Inc. v. Ocean Twp., 48 N.J. 122, 224 A.2d 1 (1966) 8

RULES CITED:

R.R. 1:1-1A (now R. 2:12-2) 6

Statutes Cited:

N.J.S.A. 40:55-39 4

N.J.S.A. 40:14A-1, et seq. 3, 4

OTHER AUTHORITIES CITED:

United States Constitution, Fifth and Fourteenth Amendments 7

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Question Presented

Will a Writ of Certiorari be allowed where the petition indicates only that petitioners utterly failed to prove at the trial level of a state court such facts as would warrant the application of certain principles of law consonant with the Fifth and Fourteenth Amendments to the Federal Constitution, which principles of law have long been firmly established and enforced by the courts of that state?

Statement of the Case

Petitioners were principals in and are the successors in interest to Pershing Park, Inc., and 42 other New Jersey corporations which developed and sold a development of 1,664 houses known as "Sayre Woods South" in the Township of Madison, Middlesex County, New Jersey. The number of corporations used has no substantive significance and they were probably part of a tax shelter scheme. Throughout the proceedings the petitioners acted as the only and real parties in interest. The project was conceived in 1954, the necessary land was acquired in 1955 and 1956 (Pa473-4 to 16),[1] and construction commenced in 1959. The development was a huge success; title to all but a few of the 1,644 homes closed by the end of 1961 (Pa1963 to Pa1966).

The facts which can be derived from the record have been presented in detail in the joint Reply Brief filed by the respondents, Township of Madison, the Mayor and Council of the Township of Madison (both being designated hereafter

1 References are to the Petitioners' appendix filed in the Appellate Division of the Superior Court of New Jersey.

"Township"), the Madison Township Sewerage Authority (hereafter "Sewerage Authority") and the Madison Township Board of Education (hereafter "Board of Education") in the Appellate Division of the Superior Court of New Jersey and in the Joint Reply to the Petition for Certification of the same respondents filed in the Supreme Court of New Jersey. This Court is urged to consider the statements of fact as well as the legal arguments there presented. A short summary of the salient facts should suffice here.

The idea for a development of the type and size of "Sayre Woods South" was first conceived in 1954. By 1956 petitioners had taken title to or otherwise acquired control of the raw lands necessary for the development. Preliminary subdivision approval was obtained in ordinary course. Final subdivision approval was issued by a lame duck municipal administration on December 20, 1956 (Pa1730). A new administration took office on January 1, 1957 and asserted that substantial defects in the final subdivision approval existed. After petitioners threatened litigation unless an agreement was reached, petitioners and the Township entered into a written agreement dated May 19, 1958, concerning the validity of the final subdivision approval, certain building code and zoning concessions, and other matters, including provisions for schools (Pa2419).

At about the same time the Sewerage Authority (created pursuant to N.J.S.A. 40:14A-1 et seq.) deliberated petitioners' application for the approval of a sewage disposal system for the development. Because of the great size of the development and the fact that it was close to the established regional

facilities of the Middlesex County Sewerage Authority (created pursuant to N.J.S.A. 40:14A-1 et seq.) the Sewerage Authority refused to allow either individual septic systems or an on-site "package plant." The Sewerage Authority insisted that sewage collected within the development be carried by connector line to the existing trunk line of the Middlesex County Sewerage Authority from whence it would be carried to that Authority's regional disposal plant. Recognizing probable future development in that area of Madison Township, the Sewerage Authority gave consideration to a larger connector line than that which would suffice for petitioners' development. After some negotiation, a contract was executed on April 21, 1958 between the Sewerage Authority and the petitioners which provided for the construction of a connector line of a size in excess of that needed for the petitioners' development. While the agreement provided that the Sewerage Authority would pay petitioners not less than $210,000 for the increase in the size of the line, actual payments to the petitioners amounted to $231,000. The line was completed in 1959 and since then has been maintained by the Sewerage Authority. No fees were charged to the petitioners for the privilege of connecting the 1,644 homes in the development to the connector line.

On December 30, 1965, and January 4, 1966, petitioners applied to the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55-39 for variances from the then current zoning ordinances to construct a hamburger stand and other uses on two parcels "left over" from the development (Pa1; Pa31-20). When these variances were denied, plaintiffs filed two complaints in lieu of preroga-

tive writ on March 30, 1966, to set aside the denials (Pa1; Pa31). Each of the complaints also contained counts seeking damages for $1,650,000 as the cost of schools and school lands conveyed to the Board of Education and $450,000 as the cost of installing the connector line carrying the sewage generated by the development to the regional treating facilities of the Middlesex County Sewerage Authority. The complaints were the first indication of any claim by petitioners.

Aside from their lateness, another facet of the complaints is that their content enables a true assessment of petitioners' motives in filing them and, consequently, a true assessment of the validity of the petitioners' claims. Although the complaints sought damages for schools and school lands conveyed to the Board of Education and for a connector line dedicated to the Sewerage Authority, neither the Board of Education nor the Sewerage Authority were originally joined in the suits as party defendants. The only defendants named and joined were the Township of Madison, the Mayor and Council of the Township of Madison, and the Board of Adjustment. The Board of Education and the Sewerage Authority were later permitted to join as intervenors upon their motions. While both complaints were consolidated for trial by consent, those aspects of the dispute concerning the validity of the denial of the variances were separately disposed of by the Law Division of the Superior Court on briefs and on the record adduced before the Board of Adjustment.

The primary relief sought in each complaint was a reversal of the Board of Adjustment denials and, almost as an afterthought, certain counts

were included asserting that the Township and Board of Adjustment were liable for damages — not for unlawful coercion, but for breach of contract! Later the petitioners asserted that they were coerced into executing the very contracts which they earlier had asserted were breached by the respondents!

The claims involving the schools and connector sewer came on for trial before Judge Abe S. Schwartz sitting without a jury. When petitioners rested, the claims against the Township and the Sewerage Authority concerning the connector sewer were dismissed (Pa75) on the grounds that petitioners had failed to prove any coercion and that the Sewerage Authority, in insisting upon proper disposal and paying for the requested over-sizing of the line, had not been shown to have acted arbitrarily. Similarly, at the end of the entire case, judgments in favor of the Township and Board of Education with respect to the remaining claims were entered (Pa77) on the grounds that no coercion had been proven.

Petitioners thereupon took an appeal to the Appellate Division of the Superior Court (Pa80) and while that appeal was pending they made application pursuant to former New Jersey Court Rule R.R. 1:1-1A (now R. 2:12-2) for certification of the appeal by the Supreme Court of New Jersey (Da,pc-1).[2] That application was denied (Da,pc-8). The Appellate Division thereafter affirmed the judgments below in a per curiam

2 Reference is to these Respondents' Appendix filed in reply to the Petition for Certification in the New Jersey Supreme Court.

opinion dated November 10, 1969 (Pa,pc-1).[3] Petitioners then filed a Petition for Certification with the Supreme Court of New Jersey which was denied and reported in 55 N.J. 316, 261 A.2d 359 (1970). An Application for Reconsideration of the Petition for Certification followed and was also denied.

The Township, Board of Education and Sewerage Authority provide this reply to Petitioners' Petition for Certiorari only insofar as the claims concerning the schools and connector line are concerned. The matters raised in the Petition for Certiorari concerning the zoning issues will be the subject of a separate reply to be filed by the Zoning Board of Adjustment.

Argument

Point I

THE COURTS BELOW WERE FULLY COGNIZANT OF THE LONG ESTABLISHED PRINCIPLES OF NEW JERSEY LAW WHICH WERE IN FULL ACCORD WITH THE DICTATES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION; PETITIONERS HAVE SIMPLY FAILED TO PROVE SUCH FACTS AT TRIAL AS WOULD HAVE REQUIRED THE APPLICATION OF THOSE SETTLED PRINCIPLES AND CONSEQUENTLY A WRIT OF CERTIORARI SHOULD BE DENIED.

During the appellate history of this case petitioners have repeatedly given evidence that they apparently suffer from a malady which compels them to assume facts which are not existent in the record. They then argue that admittedly

3 Reference is to the Petitioners' Appendix filed with their Petition for Certification in the New Jersey Supreme Court.

settled principles of law were not applied to such facts. For example, it is asserted in the Petition for a Writ of Certiorari (p. 8) that petitioners were "...compelled to donate school lands and buildings without compensation..." and that they were also "...compelled to construct an off-site sewerage line without just compensation." If that were factually correct, these respondents would have no alternative but to concede the propriety of a Writ of Certiorari. However, a review of the extensive record reveals that no credible evidence of the compulsion of schools or the connector line was adduced at trial and consequently the trial court found that no such facts existed. As a result, the trial court as well as the appellate courts below, not having been given the facts necessary to apply the pertinent doctrines of law, found against petitioners.

All of the courts below were well aware of the principles enunciated in cases such as West Park Avenue, Inc. v. Ocean Twp., 48 N.J. 122, 224 A.2d 1 (1966); Daniels v. Borough of Point Pleasant, 23 N.J. 357, 129 A.2d 265 (1957); and Midtown Properties, Inc. v. Madison Twp., 68 N.J. Super. 197 (Law. Div. 1961), affirmed o.b. 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1966), which may be summarized as prohibiting municipalities and their agencies from coercing a developer into conveying schools or other benefits to a municipality by withholding building permits or other municipal approvals. Such action would clearly be an unconstitutional deprivation of property and a denial of equal protection of the law. But it is also true that there is no provision of law, either state or federal, which prohibits the promoter of a vast development such as that involved here from volun-

tarily making school lands and buildings available to a municipality without charge. Why would a developer do this? It must be realized that the project did not involve a few or even a hundred homes but was of such breadth as would stagger the imagination. It was apparent that the essentially rural municipality of Madison Township would be unable, even if every municipal official were to work in good faith to their respective limits of ability and endurance, to provide schools to serve the development on a schedule which would accord with the petitioners' time-table of completion. Since the availability and convenience of schools were undoubtedly a major selling factor it is apparent that the petitioners made a logical business determination and decided to provide the necessary schools on an appropriate schedule. The petitioners then advertised the schools as being convenient, "free" and without assessment and also adjusted the pricing of the homes. The quick sell-out of the development is witness to the wisdom of that determination.

With regard to the contentions concerning the Sewerage Authority, a similar situation existed. There was no exaction of anything from the petitioners without just compensation. In short, the Sewerage Authority simply would not permit the petitioners to damage the local environment by erecting a package sewerage plant which would discharge into a local stream and would not permit the installation of septic tanks on each of the 1664 tiny lots comprising the project. The Sewerage Authority instead insisted that other and more complete sewage disposal facilities be provided. Since the regional facilities of the Middlesex County Sewerage Authority were available nearby, the petitioners were directed to connect thereto.

No proof whatsoever was introduced at trial by petitioners that the exercise of discretion by the Sewerage Authority in these regards was other than reasonable. The Sewerage Authority next determined that it would be wise, because of anticipated future development, to expand the size of the line. It accordingly requested that petitioners do so and negotiated an allocation of the cost thereof. As a result, a contract was executed between the Sewerage Authority and petitioner allocating the estimated cost of $450,000 in the amount of $210,000 to the Sewerage Authority with the balance to the petitioners. In fact, the Sewerage Authority paid petitioners $231,000. Again, no proof whatsoever was introduced at trial to illustrate that this allocation was arbitrary or unreasonable.

Petitioners' bald statements of unconstitutional municipal action are without basis in the record. There is really nothing more presented by petitioners other than a simple quarrel with the factual conclusions made by the trial court. This does not constitute a reason of such character as would warrant the grant of a Writ of Certiorari. See U.S. Sup. Ct. Rule 19. The petition should therefore be denied.

Conclusion

For the reasons herein discussed, based upon the authorities cited, it is urged that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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